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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE R. ARIYOSHI, WAYNE MINAMI, and HERBERT CHUN,
Petitioners,

v.

ROBERT L. PEKARSKY and ARNIE T. KOCH,
Individually and on behalf of all others similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of attorneys fees under 42 U.S.C. § 1988 is manifestly unjust and contrary to Congressional purpose where it is established that there is any violation of civil rights laws and the case record establishes that allegations of discrimination were groundless and without merit?

2. Whether plaintiffs may fairly be described as "prevailing parties" in a discrimination case where it is established that discrimination did not occur?

3. Whether, in cases involving settlements among multiple defendants, all defendants become liable for an award of attorneys' fees merely because of their concurrence in the settlement, so that it becomes possible for plaintiffs to seek and recover fees against defendants who were not real parties in interest?

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

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No. 83-____

GEORGE R. ARIYOSHI, WAYNE MINAMI, and HERBERT CHUN,
Petitioners,

v.

ROBERT L. PEKARSKY and ARNIE T. KOCH,
Individually and on behalf of all others similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners George R. Ariyoshi, Wayne Minami, and Herbert Chun, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit reported at 695 F.2d 352 (9th Cir. 1982), is attached to this Petition as Appendix A.

Its Order denying Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc* is attached hereto as Appendix B.

The Order on Application for Attorneys' Fees of the United States District Court for the District of Hawaii is attached hereto as Appendix C.

The District Court's Order denying Petitioners' Motion for Reconsideration is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 21, 1982. Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc* was denied on May 9, 1983. Appendix B. No judge of the Ninth Circuit requested a vote on the suggestion for rehearing. Appendix B at pp. 13a, 14a.

STATUTES INVOLVED

42 U.S.C. § 1988, *Proceeding in vindication of civil rights:*

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not

inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The case involves a class action lawsuit filed by Respondents against multiple defendants. Named as defendants were the three Petitioners herein and eight members of the State of Hawaii's Board of Dental Examiners. All defendants were named in both their individual and official capacities.[1]

The Board of Dental Examiners (hereinafter referred to as the Board) was created under Chapter 448, Hawaii Revised Statutes (hereinafter "HRS"). Under that chapter, the responsibility for the governance of the practice of dentistry is reposed in the Board. It is within the exclusive jurisdiction of the Board to review the qualifications of applicants for dental licenses (HRS § 448-11), to examine applicants in the theory and practice of dentistry (HRS § 448-10), to discipline licensees or refuse to grant

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[1] During the pertinent period of time, George Ariyoshi was the Governor of the State of Hawaii, Wayne Minami was the Director of the Department of Regulatory Agencies, and Herbert Chun was the Executive Secretary to the Board of Dental Examiners.

licenses (HRS § 448-17), and to grant licenses to practice dentistry in the State of Hawaii (HRS §§ 448-12 and -13).

The gravamen of Respondents' complaint was that beginning in and around mid-year 1974, Defendants utilized the State dental examination to discriminate against Caucasians and/or new and nonresidents who applied for dental licenses in the State of Hawaii. Respondents alleged that, because of this discrimination Asian-American and/or long-time resident-examinees passed the State dental examination at a higher rate than Caucasian, new, or nonresident-examinees.

Respondents alleged federal jurisdiction under 28 U.S.C. § 1343, § 1331, and § 1337; 42 U.S.C. § 1981, § 1982, § 1983, § 1985, and § 1986; the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution; the Commerce Clause of the United States Constitution; the Due Process Clause of the United States Constitution; the Equal Protection Clause of the United States Constitution; and the Fourteenth Amendment to the United States Constitution. Respondents also requested the District Court to hear the pendent state claims of fraud and violations of the State Administrative Procedures Act, HRS Chapter 91.

Respondents sought declaratory and injunctive relief and damages. With respect to Petitioner Ariyoshi, Respondents sought to enjoin and restrain the Governor of the State of Hawaii from failing to remove the members of the Board.

In the proceedings before the District Court, Petitioners were represented by the Attorney General. As noted by the District Court, the Board members were represented by their insurance carriers. See Appendix C at p. 15a.

The insurance carriers elected to settle the damage claim against the Board members and all parties entered into a Stipulation and Agreement of Settlement (hereinafter "Agreement") which provided for the payment of damages by the Board members, the modification of dental licensing examination procedures, and expungement of the records of class members who had failed past examinations. The Agreement dismissed with prejudice the eight Board members and reserved for later hearing Respondents' request for attorneys' fees against Petitioners.

Under the terms of the Agreement, no damages were to be sought against Petitioners. Additionally, the Agreement did not require the Governor of Hawaii to remove any Board member.

The Agreement also provided, *inter alia*, that a record be kept of examinations conducted under the modified examination procedures showing the total number of applicants who passed and failed the examination, and the racial and residential composition of the successful and unsuccessful applicants. The record of such data was to be reported to the District Court and to Respondents.

Respondents moved for an award of fees and costs in October, 1980, against Petitioners seeking a sum of $307,486.29. Petitioners were named in both their individual and official capacities. Neither the State of Hawaii nor the members of the Board were named in Respondents' motion for attorneys' fees.

In response to the motion for attorneys' fees, Petitioners argued, *inter alia*, that fees should not be awarded because (1) "special circumstances" justified a denial of attorneys' fees, to wit, the record of examination conducted under the modified examination procedures showed that Respondents' claim of discrimination was

without merit inasmuch as statistical data showed that Asian-American and long-time residents continued to pass the modified dental licensing examination at rates higher than Caucasians and new or nonresidents, and (2) Respondents did not prevail against Petitioners inasmuch as the relief obtained under the Agreement was directed at the Board which had exclusive jurisdiction to regulate the examination and licensing of applicants for dental license in the State of Hawaii.

Petitioners further argued that the doctrine of immunity barred any recovery of fees against Petitioners in their individual capacities and that Respondents' request for fees was excessive.

On December 16, 1980, the District Court rendered its Order on Application for Attorneys' Fees. Appendix C. The District Court acknowledged that Respondents "have not come forward with evidence that discrimination actually occurred and the *recent examination results tend to show that it did not.*" (Emphasis added.) Appendix C, at p. 19a. The court also recognized that there were "no facts indicating that any of the state defendants [Petitioners] engaged in acts or conduct which denied plaintiffs their constitutional rights" and that Petitioners' "activities appear to have been confined to the lawful performance of the duties of the office." Appendix C, at p. 17a. However, the District Court found that the State of Hawaii was liable for an award of attorneys' fees by determining that the Agreement had dismissed the Board members in their individual capacities only, thereby leaving open Respondents' claim for fees against both Petitioners and the members of the Board in their official capacities. This finding was made despite the clear language of the Agreement dismissing the case against the Board members and despite the fact that Respondents'

motion for attorneys' fees did not specifically name either the State of Hawaii or the members of the Board in their official capacities. The District Court also found no basis for assessing fees against Petitioners in their individual capacities. The court substantially reduced Respondents' request for fees and cost and awarded fees and cost against all defendants in their official capacity only, in the amount of $152,732.58.

On February 10, 1981, Petitioners filed their notice of appeal to the Ninth Circuit Court of Appeals.

On December 21, 1982, the Ninth Circuit, in a split (2 - 1) decision, determined that an award of fees against Petitioners was justified but reversed and remanded the lower court's decision for a recalculation of the fee award against Petitioners. The Ninth Circuit found that the lower court erred in finding that the Agreement left open Respondents' claim for fees against the dismissed Board members in their official capacities. The Ninth Circuit found that the overall monetary damage figure which was to be paid by Board members under the Agreement included an attorneys' fees component and that the Agreement preserved Respondents' claim for attorneys' fees only against Petitioners. The Ninth Circuit determined that it was, therefore, improper for the lower court to include in the award of attorneys' fees the amount of fees and cost Respondent incurred in prevailing against both Petitioners and the Board members. The Ninth Circuit concluded that on remand the lower court should determine and award only such attorneys' fees attributable to work performed by Respondents in prevailing against Petitioners.

Although the Ninth Circuit opined that Respondents prevailed against Petitioners, the court's decision was not predicated upon any finding of wrongdoing on the part of

Petitioners. Rather, the Ninth Circuit focused upon the Hawaii Administrative Procedure Act, HRS Chapter 91, which provides that agency rules "are subject to the approval of the governor." HRS § 91-3(c). The Ninth Circuit, interpreting Hawaii law, was of the belief that implementation of the modifications set forth in the Agreement constituted "rules" under the Hawaii Administrative Procedures Act, and, therefore, required adoption by the Board of new rules, which to be valid, required the approval of the governor.

Petitioners filed a Motion for Rehearing and Suggestion for Rehearing *En Banc*. In a split (2-1) decision, the Ninth Circuit denied the petition for rehearing. The suggestion for rehearing *en banc* was also denied.

EXISTENCE OF JURISDICTION BELOW

Respondents invoked the jurisdiction of the District Court below by a complaint under 28 U.S.C. § 1343, § 1331, and § 1337; by 42 U.S.C. § 1981, § 1982, § 1983, § 1985, and § 1986; by the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution; by the Commerce Clause of the United States Constitution; by the Due Process Clause of the United States Constitution; by the Equal Protection Clause of the United States Constitution; and by the Fourteenth Amendment to the United States Constitution. Respondents further asserted that the matter in controversy exceeded in value, exclusive of interest and costs, $10,000.

REASONS FOR GRANTING THE WRIT

I.

An Award Of Fees Is Manifestly Unjust And Contrary To Congressional Purpose Where The Record Fails To Indicate Any Violation Of Civil Rights Laws And The Record Establishes That Allegations Of Discrimination Were Groundless And Without Merit.

Respondents alleged that the Hawaii dental licensing examination was utilized to discriminate in favor of Asian-American and long-time Hawaii residents and against Caucasians, new, or non-residents. Under Hawaii law, the examination and licensing of applicants for dental licensure falls within the exclusive jurisdiction of the Board.

Although regulation of the practice of dentistry is the responsibility of the Board, Petitioners, in addition to the members of the Board, were named as defendants.

Petitioners have repeatedly denied Respondents' allegations of discrimination.

Petitioners did agree to sign the Agreement which settled the lawsuit. It is important to note that in the Agreement, Petitioners again denied liability. Additionally, the major provision of the Agreement relates to matters within the exclusive jurisdiction of the Board, to wit, modification of the licensing examination procedures. With regard to Petitioners, the Agreement did not impose any sanctions against Petitioners, nor did the Agreement change or affect the rights, powers and duties of Petitioners. Additionally, no damages were assessed against Petitioners nor was the governor of Hawaii required to remove members of the Board.

Under the terms of the Agreement, a record was to be kept of subsequent examination results showing the total

number of applicants who passed and failed and the racial and residential composition of the successful and unsuccessful applicants.

Results of the August, 1979, February, 1980, and August, 1980, dental examinations, held after the agreed-to modifications were instituted, "convincingly rebut [Respondents] claim of discrimination." Concurring and Dissenting opinion of Circuit Judge Choy, 695 F.2d at 356. As Judge Choy observed:

> The results show that Asian Americans and long-term residents are still passing the dental licensure examination at rates significantly higher than Caucasians and new or non-residents. In fact, *the differential in pass rates between the groups has generally increased since the anonymous grading procedures have been used.* [Emphasis added.] *Id.*

The District Court had before it the results of the three dental examinations and a statistical study performed by Petitioners' expert which revealed that the differential in pass rate between Asian-American and long-term residents and Caucasian, new, or non-residents were remarkably similar to that found in other states. The statistical study also offered various plausible, non-discriminatory reasons for the differentials.[2] 695 F.2d at 357-58.

In its Order on Application for in Attorneys' Fees, the District Court found that Respondents "have not come forward with evidence that discrimination existed" and acknowledged that "the recent examination results tend to show that it did not." Appendix C, at p. 19a.

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[2] The statistical study was attached to Petitioners' Memorandum in Opposition to Motion for Order Granting Attorneys' Fees and Costs and was not objected to by Respondents.

Despite the absence of any showing of discrimination in the examination procedure, and despite the fact that it is the Board and not Petitioners which administers the dental licensing examination, the District Court and the Ninth Circuit determined that an award of attorneys' fees against Petitioners was authorized under 42 U.S.C. § 1988.

Section 1988 was not enacted to encourage private citizens to bring unmeritorious civil rights suits, nor was it enacted to provide windfall profits to lawyers. As Justice Brennan recently observed in *Hensley* v. *Eckerhart*, ___ U.S. ___, 51 U.S.L.W. 4552, 4558 (May 17, 1983) (Concurring in part and dissenting in part):

> Congress took steps to insure that § 1988 did not become a "relief fund for lawyers" . . . it limited fee awards to "prevailing" plaintiffs, rather than allowing fees for anyone who litigated a bona fide claim in good faith.

Although naming Petitioners as defendants in this action may well have been a valid litigation tactic, to award fees against Petitioners in light of the facts and circumstances of this case would not further congressional purpose in enacting § 1988. An award of fees would be tantamount to penalizing Petitioners for participating in a settlement of this lawsuit, a settlement which did not sanction or significantly affect Petitioners. As Judge Choy warned:

> Congress' purpose in authorizing the award of attorneys' fees under § 1988 was to remove the financial impediments that might otherwise hinder a private citizen from asserting his or her civil rights. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910. It certainly was not to encourage private citizens to bring unmeritorious civil rights suits. The majority's

approval of the award of attorneys' fees against appellants, however, disturbingly moves toward this result.

The recent examination results dispel any hint of discrimination and demonstrate that appellees' class action suit was in fact baseless. The very foundation for an attorneys' fee award has thus been swept away. Appellees have already received a windfall of $325,000 as a result of the damages paid by the Dental Board defendants under the settlement agreement. We should not compound the inequity by heaping the cost of attorneys' fees onto their winnings—a cost that will be payable by the State and thus ultimately and unfairly borne by its taxpayers. [Appendix C, at p. 26a.]

II.

This Court Should Provide A Definitive Answer As To The Proper Standard For Determining Whether Attorneys' Fees Should Be Awarded Where The Case Involves Multiple Defendants And Plaintiffs Achieve Settlement On The Central Issue But Seek Attorneys' Fees Against Only Some Of The Defendants, None Of Whom Were Real Parties In Interest To The Central Issue.

Under 42 U.S.C. § 1988, attorneys' fees may be awarded only where a party has prevailed against a defendant from whom fees are sought. This Court has recently held that the "extent of a plaintiff's success is a crucial factor" in awarding such fees. *Hensley* v. *Eckerhart*, 51 U.S.L.W. at 4556.

The instant case involves multiple defendants, to wit, eight members of the Board and Petitioners. The central issue of Respondents' lawsuit concerned the allegation that the State dental licensing examination was utilized for discriminatory purposes.

Under Hawaii law, administering the dental licensing examination falls within the exclusive purview of the

Board. This fact was acknowledged in the Amended Complaint filed by Respondent wherein Respondents state that it is the Board which "administers a bi-annual examination;" that beginning "in or around 1974 the Board of Dental Examiners . . . purposely utilized the State dental examination for the discriminatory purpose . . ." and that the examination "given by the Board" is "subjectively graded personally by the Members of the Board."

The Agreement settled the central issue by providing, *inter alia*, for a modified examination procedure to insure annonymity of examinees in future examinations administered by the Board. The Board defendants also agreed to pay damages in the amount of $325,000.

The Agreement further provided that the lawsuit against the Board defendants would be dismissed with prejudice and reserved the matter of attorneys' fees against Petitioners for a future hearing.

All parties to the lawsuit, including Petitioners, approved the Agreement.

Respondents now seek an award of fees against Petitioners alone.

The question presented herein is whether, in cases involving multiple defendants, all defendants are necessarily liable for attorneys' fees merely because the case ends in a settlement which is signed by all defendants.

The standard currently applicable for determining whether a plaintiff is a "prevailing party" to recover attorneys' fees under § 1988 is inadequate where multiple defendants are involved. Generally, one may be considered a prevailing party if he succeeds on any significant issue in litigation which achieves some benefits the

parties sought in commencing the suit. *See, e.g., Hensley* v. *Eckerhart, supra; Doe* v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982); *Johnston* v. *Jago*, 691 F.2d 283 (6th Cir. 1982); *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978). However, this formulation is inapplicable in situations involving multiple defendants where plaintiffs do prevail on a significant issue, but seek attorneys' fees against only some defendants, none of whom were real parties in interest to the central issue.

The confusion is readily apparent in this case. Arguably, Respondents did prevail on an issue unrelated to civil rights by achieving a benefit sought in bringing this lawsuit, to wit, modification of the dental licensing examination to preclude alleged discriminatory utilization of the State dental licensing examination. However, the benefit is one which was achieved against the Board which is the State agency charged with the duty and responsibility of administering the dental licensing examination and determining the qualifications of applicants for licensure. Also, while damages were recovered, they were assessed only against the Board members and not against Petitioners. Rather than proceeding against the Board members for an award of fees, Respondents elected to move for an award against Petitioners.

The District Court found that Respondents did achieve some benefit and awarded attorneys' fees. However, in awarding fees the District Court failed to address the issue of whether Respondents had prevailed against Petitioners. Instead, the District Court determined that the Agreement dismissed the Board members in their individual capacities only, thus leaving open Respondents' claim for attorneys' fees against *all* defendants in their official capacity. The District Court's determination ignored the clear language of the Agreement dismissing the Board members and ignored the fact that Respon-

dents' motion for attorneys' fees named only Petitioners and not the State of Hawaii or the Board members. On appeal, the Ninth Circuit found that the District Court erred in finding that the Agreement left open Respondents' claim for attorneys' fees against the dismissed Board members. 695 F.2d at 354. However, the Ninth Circuit concluded that Respondents did prevail against Petitioners, thus justifying an award of attorneys' fees, because (1) the Agreement called for an expungement of examination records of class members who failed the dental licensing examination and (2) implementation of the modifications of the examination procedures, as set forth in the Agreement, will require the adoption by the Board, of "rules" as that term is defined in HRS Chapter 91, the Hawaii Administrative Procedures Act, and these new rules, to be valid, must be approved by the governor.

The range and impact of the Ninth Circuit's decision is immense and may result in a chilling effect upon participation in settlements by "peripheral" defendants. Under the Ninth Circuit's rationale a defendant who is not a real party in interest to the central issue of the lawsuit, will necessarily be liable for an award of attorneys' fees merely because (1) that defendant agreed with other defendants to a settlement of the lawsuit and (2) some responsibility, however minor, is imposed upon that defendant.

Petitioners submit that in cases involving multiple defendants which are settled pursuant to an agreement, the inquiry as to whether a plaintiff is a prevailing party against a particular defendant must not come to an end merely with a finding that plaintiff has achieved success on the central issue of the lawsuit. Under such an abbreviated inquiry all defendants necessarily become automatically liable for an award of attorneys' fees irrespective of whether plaintiffs' action vindicated important civil

rights claims against the particular defendant from whom attorneys' fees are sought. Other factors which should be but which were not considered in this case include (1) whether the defendant is a real party in interest to resolving the central issue of the lawsuit (2) whether the duty or responsibility imposed upon the defendant in the Agreement is one which the defendant would have discharged or could have discharged without being named as a defendant in the action. With respect to the latter criteria, both the Eleventh Circuit and the Fifth Circuit Courts of Appeal have applied the rule that "a civil rights plaintiff may not collect attorneys' fees for demanding that a state officer do what he would have done in any case." *Coen* v. *Harrison County School Board*, 638 F.2d 24 (5th Cir. 1982), cert. den. 455 U.S. 938 (1982). *See also*, *Williams* v. *Leatherbury*, 672 F.2d 549 (5th Cir. 1982); *Doe* v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982). Applied to the instant case, the fact that the governor is bound by statute to approve agency rules under the Hawaii Administrative Procedures Act should not, *ipso facto*, be deemed a basis for awarding attorneys' fees. The signing of agency rules promulgated by the Board would have been done by the governor irrespective of whether he was named in the instant action. Additionally, since it is the responsibility of the Dental Board to, *inter alia*, examine applicants and review their qualifications, expungment of examination records could also have been accomplished without the necessity of naming Petitioners as defendants.

Allowing the Ninth Circuit's decision to stand would have an adverse impact upon the settlement of lawsuits in cases involving multiple defendants. The issue before this Court on certiorari is of great importance and is one which demands resolution at this time.

CONCLUSION

For the foregoing reasons, this Petitioner for Writ of Certiorari should be GRANTED.

DATED: Honolulu, Hawaii, August 8, 1983.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

No. 81-4077.

Robert L. PEKARSKY and Arnie J. Koch, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

George R. ARIYOSHI, individually and in his capacity as Governor, State of Hawaii; Wayne Minami, individually and in his capacity as Director of Regulatory Agencies, State of Hawaii; Herbert Chun, individually and in his capacity as Executive Secretary for the Board of Dental Examiners, Department of Regulatory Agencies, State of Hawaii,
Defendants-Appellants,

and

Edward G. Maehara, *etc., et al.,*
Defendants.

Argued and Submitted Feb. 12, 1982.
Decided Dec. 21, 1982.

Appeal was taken from order of the United States District Court for the District of Hawaii, William W. Schwarzer, J., sitting by designation, which awarded attorney fees in favor of plaintiffs in civil rights action. The Court of Appeals, Poole, Circuit Judge, held that: (1) certain defendants had been dismissed in both their individual and official capacities as result of settlement agreement and attorney fees could not be awarded against them, and (2) plaintiffs had succeeded against certain other defendants and attorney fees could be awarded against them.

Reversed and remanded.

Choy, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Melvin Y. Nishimoto, Honolulu, Hawaii, for defendants-appellants.

Stanley E. Levin, Honolulu, Hawaii, for plaintiffs-appellees.

Appeal from the United States District Court for the District of Hawaii.

Before CHOY, PREGERSON and POOLE, Circuit Judges.

POOLE, Circuit Judge:

Appellants Ariyoshi, Minami and Chun ("Appellants") appeal from the district court's order awarding attorneys' fees and costs against the State of Hawaii under the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988. We reverse and remand for further proceedings.

Appellees brought the underlying class action civil rights suit on behalf of all Caucasians and new or non-residents of Hawaii who had failed to pass the Hawaii State dental licensure examinations between 1974 and 1979. Named as defendants in both their individual and official capacities were the eight members of the Dental Board of Examiners ("Dental Board defendants") and the Appellants, who were charged with discrimination against members of the class in the administration of the examinations.

The parties eventually entered into a Stipulation and Agreement of Settlement ("Agreement") which provided for the payment of damages by the Dental Board defendants, the modification of examination procedures, and expungement by the State of the records of class members who had failed past examinations. The Agreement also dismissed with prejudice the eight Dental Board defendants and reserved for later hearing the appellees' request for attorneys' fees against the three Appellants.

After the settlement was approved by the court, appellees moved under 42 U.S.C. § 1988 for an award of attorneys' fees against the Appellants. The court found that the Agreement

had dismissed the Dental Board defendants in their individual capacities only, thus leaving open appellees' claim for attorneys' fees against all defendants—Appellants and Dental Board members—in their official capacities. The court then awarded fees against all defendants in their official capacities, which award was held to be the liability of the State under *Hutto* v. *Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978).

Appellants contend on appeal that, contrary to the district court's finding, the effect of the Agreement was to dismiss the Dental Board defendants in both their individual and official capacities, leaving open appellees' claim for attorneys' fees only against the three Appellants. The latter now argue that, because appellees did not prevail against them, attorneys' fees against them were not justified. Further, they argue that, even if appellees did prevail against them, the fees awarded were clearly excessive.

We conclude that the district court erred in finding that the Agreement left open appellees' claim for attorneys' fees against the dismissed Dental Board defendants in their official capacities. The interpretation of a settlement agreement, like that of a contract, is a question of law subject to de novo review by this court. *Kittitas Reclamation District* v. *Sunnyside Valley Irrigation District*, 626 F.2d 95, 98 (9th Cir. 1980).[1] In our

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[1] Appellees argue that the district court's interpretation was not confined to the four corners of the Agreement, but was based on the court's independent knowledge of the parties' intent. According to appellees, the court gained this knowledge through its close and extensive involvement in the settlement negotiations between the parties. Appellees further argue that, because the court's interpretation was thus based on extrinsic evidence of intent, it should be reviewed under the clearly erroneous standard.

We have reviewed the full record on appeal, including the transcript of the hearing on attorneys' fees, and have found no indication that the district court based its interpretation on anything other than the Agreement itself. The court made no findings of extrinsic fact with respect to the intent of the parties, nor did it state that it was

view, the Agreement here is unambiguous and must be construed as having dismissed the Dental Board defendants in both individual and official capacities, and as having left open appellees' claim for attorneys' fees only against Appellants.

The relevant paragraphs of the Agreement read as follows:

> 12. There will be dismissal, with prejudice, as to defendants Maehara, Minato, Kurashima, Yang, Shindo, Kahoe, Hirano, and Au [Dental Board defendants] following approval by the Court of the settlement.
>
> * * * * * *
>
> 16 The matter of plaintiffs' attorneys' fee request against Defendants Ariyoshi, Minami and Chun [Appellants] is reserved for hearing thereon separately on December 1, 1980 by the Court.

The dismissal of the Dental Board defendants in paragraph 12 is in no way limited to dismissal in their individual capacities. The defendants were sued in their dual capacities, and reference to them by name only, without specifying one capacity or the other, is most reasonably construed as reference to both capacities. Furthermore, paragraph 16 reserves appeallees' request for attorneys' fees against Appellants Ariyoshi, Minami and Chun only. Had the Dental Board defendants been dismissed only in their individual capacities, paragraph 16 would logically have reserved for future determination the attorneys' fees question against such defendants in their official capacities. As to the Dental Board defendants, in both their individual and official capacities, we therefore conclude that the overall settlement figure included an attorneys' fees component.

We next conclude that appellees did prevail against the three Appellants, thus justifying an award of attorneys' fees

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relying on knowledge gained through its involvement in the settlement process. We cannot assume that the court's interpretation was based on undisclosed extrinsic evidence. Such evidence, if it existed, would properly have been set forth in the record in the form of findings of fact.

against them as well[2] The expungement of records and the reform of the examination procedures required by the Agreement represent relief obtained against Appellants. The implementation of these reforms will require the adoption by the Dental Board of new rules, which, to be valid, must be approved by Appellant Ariyoshi as Governor. *See* H.R.S. § 91-3(c); *Otani* v. *Contractors License Board, et al.*, 51 Haw. 673, 466 P.2d 1009, 1011 (1970). We are unpersuaded by Appellants' argument that the reforms will not require the adoption of "rules" within the meaning of H.R.S. § 91-3(c). The reforms will apply generally to and affect all future dental license applicants, and will involve the implementation of a new policy of examination procedures. Their implementation will therefore require agency statements falling squarely within the definition of "rule." *See* H.R.S. § 91-1(4).

While we thus conclude that attorneys' fees could be awarded against Appellants Ariyoshi, Minami and Chun, we must remand to the district court for recalculation of the amount of such award. The district court's award covered attorneys' fees incurred by appellees in prevailing against both the Appellants and Dental Board defendants. The Agreement, however, preserved only their claim for fees against Appellants. It was therefore improper to include in the award those fees attributable to work performed in prevailing against the Dental Board defendants, since the settlement paid by the Dental Board defendants included such fees. On remand, therefore, the district court should determine and award only

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[2]Judge Choy in dissent concedes that the appellees did (he states "technically") prevail, but argues that the award of attorneys' fees nevertheless would be unjust. In support of this conclusion, the dissent incorporates materials referring to dental examination results achieved after appellants, under the compulsion of this civil rights lawsuit, changed the general examination procedures. The dissent extrapolates from these results, which do not constitute the operative facts of this case, that inferences of discrimination have disappeared. This novel approach would seem to create history, a rationale which judicial philosophy does not normally accept.

such additional attorney's fees attributable to work performed in prevailing against Appellants.[3]

The order awarding attorneys' fees is REVERSED and the case REMANDED for further proceedings consistent herewith.

CHOY, Circuit Judge, concurring in part and dissenting in part:

I concur fully in that portion of the majority opinion which concludes that the settlement agreement entered into by the parties did not leave open appellees' claim for attorneys' fees against the dismissed Dental Board defendants.

However, I disagree with my Brothers Pregerson and Poole that attorneys' fees may be awarded against appellants Ariyoshi, Minami, and Chun under the peculiar circumstances attending this case. I hold no brief with the conclusion of the majority that appellees in achieving the settlement did technically prevail against these three appellants in two respects—effecting expungement of certain records and reformation of dental examination procedures. But I strongly feel that the award of any attorneys' fees would work an injustice here. *See Aho* v. *Clark*, 608 F.2d 365, 367 (9th Cir. 1979).

Section 1988, 42 U.S.C., authorizes the district court in its discretion to award reasonable attorneys' fees to a prevailing party in a civil rights suit. In exercising its discretion, the district court is guided by the standard that a prevailing civil rights plaintiff should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust. *Aho* v. *Clark*, 608 F.2d at 367; *see Newman* v. *Piggie Park Enter-*

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[3] Appellants' argument that the fee award was excessive is based solely on the contention that the fees requested by appellees were not verified by the materials submitted to the court. Since we remand for determination of the proper amount of fees we need not further address this issue.

prises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). In my view, the results of recent dental examinations which show the appellees' allegations of discrimination to be without merit constitute a special circumstance rendering any award of attorneys' fees against appellants unjust.

Appellees, who had repeatedly failed the Hawaii State dental licensure examination,[1] brought a class action suit charging the Dental Board of Examiners and appellants with discriminating in favor of Asian Americans and long-term Hawaii residents and against a class of Caucasians and new or nonresidents in conducting the dental licensure examinations. Appellees' suit was based on the inferences drawn from two observations: (1) the Dental Board defendants and appellants were predominantly long-term residents of Asian ancestry and (2) the percentage of Asian Americans and long-term residents who passed the dental licensure examination was substantially greater than the percentage of Caucasians and new or nonresidents who passed. Before any trial on the merits, the parties entered into a settlement agreement which provided for the payment of $325,000 by the Dental Board defendants, the expungement of records showing the failure of class members on prior examinations, and the modification of examination procedures to require anonymous grading. The settlement agreement also provided that a record be kept of subsequent examination results showing the total number of applicants who passed and failed, and the racial and residential composition of the successful and unsuccessful applicants.

The results of the three dental examinations held after the anonymous grading procedures were instituted convincingly rebut appellees' claims of discrimination. The results show that

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[1] Appellee Pekarsky failed the Hawaii State dental examination in August 1974 and again in February 1975 and apparently is still not presently licensed. Appellee Koch failed in the examination in August 1975, February 1975, February 1976, and August 1976. He subsequently passed the examination and is licensed to practice dentistry in Hawaii.

Asian Americans and long-term residents are still passing the dental licensure examination at rates significantly higher than Caucasians and new or non-residents.[2] In fact, the differential in pass rates between the groups has generally increased since the anonymous grading procedures have been used.[3]

The record also contains a comprehensive statistical study comparing the results of the first anonymously graded examination with results of earlier examinations. The study, performed by appellants' expert, Dr. Donald E. Wise, concludes that the data clearly do not support appellees' claims that Caucasians and new or non-residents were discriminated against in previous dental examinations. Significantly, the study reveals that the differential in pass rates between Asian

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[2] The results of the three dental examinations held after the anonymous grading procedures were instituted are as follows:

AUGUST 1979 EXAMINATION

	EXAMINED	PASSED	FAILED	% PASSED
ASIAN AMERICANS	19	15	4	78.9
CAUCASIANS	31	7	24	22.6
OLD RESIDENTS	23	17	6	73.9
NEW OR NON-RESIDENTS	27	6	21	22.2

FEBRUARY 1980 EXAMINATION

	EXAMINED	PASSED	FAILED	% PASSED
ASIAN AMERICANS	9	7	2	77.7
CAUCASIANS	17	4	13	23.5
OLD RESIDENTS	9	7	2	77.7
NEW OR NON-RESIDENTS	17	4	13	23.5

AUGUST 1980 EXAMINATION

	EXAMINED	PASSED	FAILED	% PASSED
ASIAN AMERICANS	21	18	3	85.7
CAUCASIANS	22	7	15	31.8
OLD RESIDENTS	19	15	4	78.9
NEW OR NON-RESIDENTS	24	10	14	41.7

[3] If the Dental Board defendants and the appellants had been practicing discrimination, the anonymous grading procedures would be expected to reduce substantially the differential in pass rates

Americans and Caucasians and between long-term residents and new or non-residents that exists in Hawaii is remarkably similar to that found in other states.[4] The study also offers several plausible, non-discriminatory reasons for the differentials, including the possible greater motivation of Asian Americans to succeed,[5] and the possibility that non-residents on

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between the groups. This has not occurred. The data show that the relative pass rates of Caucasians and new or non-residents has worsened, rather than improved.

PASS RATES FOR DENTAL EXAMINEES

YEAR	ASIANS	NON-ASIANS	RATIO	RESIDENTS	NON-RESIDENTS	RATIO
1974	68.8	45.9	1.50	59.3	46.2	1.28
1975	86.7	28.9	3.00	61.9	33.3	1.86
1976	78.3	25.0	3.13	76.2	28.6	2.66
1977	72.0	26.3	2.74	70.6	34.8	2.03
1978	65.5	44.0	1.49	61.1	44.2	1.38
1979	67.7	39.1	1.73	65.7	38.5	1.71
1980 FEB	77.7	23.5	3.31	77.7	23.5	3.31
1980 AUG	85.7	31.8	2.69	78.9	41.7	1.89

[4] Appellants sent a questionnaire to the board of dental examiners in each of the other 49 states requesting information on resident and non-resident pass rates and on Asian and non-Asian pass rates. Nine states responded with data on resident and non-resident pass rates. These data show that from 1972 to 1979, the resident pass rate ranged from 1.7 to 2.5 times the non-resident pass rate, a differential comparable to that existing in Hawaii.

Only Oregon and California responded with data on Asian versus non-Asian pass rates, and only in California was the number of Asian applicants large enough to allow meaningful statistical comparison. The California data show that the Asian pass rate exceeded the non-Asian pass rate by 33 percent in 1977, 11 percent in 1978, and 4 percent in 1979. These differentials compare reasonably to those found in Hawaii.

[5] Given the existence of shared ethnic and cultural identifications, it is reasonable to assume that Asian Americans will have, or at least perceive that they will have, a greater chance of succeeding in their

vacation are taking the examination without studying merely to qualify for a tax deduction. Dr. Wise states that data from subsequent examinations do nothing to alter his conclusions.

The district court had before it the results of the recent dental licensure examinations and the statistical study performed by Dr. Wise when it considered appellees' application for attorneys' fees. While acknowledging that the recent examination results tend to show that no discrimination against Caucasians and new or non-residents had actually occurred, the district court nevertheless granted appellees' application and awarded attorneys' fees against appellants. Since I believe that the evidence showing the absence of discrimination undeniably constitutes a special circumstance rendering the award of attorneys' fees unjust, I cannot escape the conclusion that the district court's award of such fees was an abuse of discretion.

The majority in their footnote 2 charges that I am improperly using the examination results, "creat[ing] history" as they term it, because the examination results do not constitute the "operative facts" of this case. I am at a loss to understand the majority's charge or the reasoning behind it. The examination results are part of the record on this appeal, having been argued to the district court by appellants, considered by the district judge, and specifically referred to by him in his written

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dental practice in areas of significant Asian American concentrations. Since Hawaii is one of the few states with a significant Asian American population, Asian American applicants for dental licenses in Hawaii will likely have a greater incentive to pass the examination. To a lesser extent, this will also be true of Asian American applicants in California.

Moreover, many of the Asian American applicants in Hawaii are long-term residents possessing numerous and close ties with family and friends. The close ties provide an additional motivation for these applicants to pass the licensure examination as the applicants strive to fulfill family and peer expectations and to avoid the considerable embarrassment resulting from failing the examination.

decision.[6] Moreover, while the examination results were not part of the case in chief on which the settlement was based, they clearly bear upon the equitable factors which a district court must consider in exercising its discretion to grant or deny attorneys' fees. In exercising its discretion, the district court is bound by the standard that attorneys' fees should not be awarded if special circumstances would render the award unjust. *Aho* v. *Clark*, 608 F.2d at 367. The examination results, which persuasively show that appellees' suit was without merit, is highly relevant to whether special circumstances in this case exist. Being part of the record and important to the district court's equitable determination, those results are certainly operative facts of this case and are properly considered in reviewing the district court's decision.

The majority's charge leads me to believe that they are laboring under the mistaken impression that once a plaintiff is found to have prevailed, the grant of attorneys' fees automatically follows. Because of this error, they assume that evidence not relevant to whether a plaintiff has prevailed is a *fortiori* not relevant to the grant or denial of attorneys' fees and should not be considered. This approach is clearly improper. The legal standard is that a prevailing plaintiff should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust. *Id.* This standard clearly contemplates that evidence, such as the examination results, which is unrelated to whether a plaintiff has prevailed may still be highly relevant to the question of attorneys' fees.

The flaw in the majority's understanding of the law leaves me troubled in that their decision to affirm the award of attorneys' fees against appellants Ariyoshi, Minami, and Chun is based on an erroneous legal premise. It is one thing for the majority to have considered the examination results, and in exercising their judgment to disagree with me that the results

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[6] The district judge stated in his decision that "plaintiffs have not come forward with evidence that discrimination actually occurred, and the recent examination results tend to show that it did not."

compel denial of attorneys' fees.[7] It is of more serious concern that the majority, relying on an erroneous premise, ignored the examination results and thus affirmed the grant of attorneys' fees without considering this crucial factual evidence.

Congress' purpose in authorizing the award of attorneys' fees under § 1988 was to remove the financial impediments that might otherwise hinder a private citizen from asserting his or her civil rights. S.Rep. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S.Code Cong. & Ad. News 5908, 5910. It certainly was not to encourage private citizens to bring unmeritorious civil rights suits. The majority's approval of the award of attorneys' fees against appellants, however, disturbingly moves toward this result.

The recent examination results dispel any hint of discrimination and demonstrate that appellees' class action suit was in fact baseless. The very foundation for an attorneys' fee award has thus been swept away.[8] Appellees have already received a windfall of $325,000 as a result of the damages paid by the Dental Board defendants under the settlement agreement. We should not compound the inequity by heaping the cost of attorneys' fees onto their winnings—a cost that will be payable by the State and thus ultimately and unfairly borne by its taxpayers.

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[7] Given my strong belief that the award of attorneys' fees against appellants would be unjust, such a disagreement in judgment would still, of course, prompt me to dissent.

[8] The anonymous grading reform secured by the settlement agreement provides some public benefit by limiting the potential for future discrimination. This benefit, however, is very limited in view of the absence of prior discrimination and does not justify the award of attorneys' fees. *See Aho* v. *Clark*, 608 F.2d 365, 367 (9th Cir. 1979).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4077
D.C. # CV 76-0455

ROBERT L. PEKARSKY and ARNIE J. KOCH, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

vs.

GEORGE R. ARIYOSHI, individually and in his capacity as Governor, State of Hawaii; WAYNE MINAMI, individually and in his capacity as Director of Regulatory Agencies, State of Hawaii; HERBERT CHUN, individually and in his capacity as Executive Secretary for the Board of Dental Examiners, Department of Regulatory Agencies, State of Hawaii,
Defendants-Appellants,

and

EDWARD G. MAEHARA, etc., *et al.*,
Defendants.

ORDER

FILED
MAY 9 1983
PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS

Before: CHOY, PREGERSON, and POOLE, Circuit Judges.

Judges Pregerson and Poole have voted to deny the petitioner for rehearing and to reject the suggestion for rehearing en banc in the above-captioned case. Judge Choy has voted to grant the petition for rehearing but to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CIVIL NO. 76-0455

ROBERT L. PEKARSKY, and
ARNIE J. KOCH, etc., *et al.*,

Plaintiffs,

v.

GEORGE R. ARIYOSHI, etc., *et al.*,

Defendants.

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
DEC 22 1980
at 1 o'clock and 10 min pm.
WALTER A. Y. H. CHINN, CLERK

ORDER ON APPLICATION FOR ATTORNEYS' FEES

This action was brought on behalf of a class consisting of unsuccessful applicants for licenses to practice dentistry in Hawaii. Plaintiffs charged defendants with violation of their constitutional rights by conducting the state's dental testing and licensing procedures in a manner which allegedly discriminated against Caucasian and non-resident applicants. The action has now been settled. Pursuant to the settlement stipulation, those individual defendants who were members of the State Board of Dental Examiners ("Dental Board") will pay $325,000 to eligible class members. In addition all defendants agreed to maintain in effect the changes in the testing and licensing procedures which were adopted during the pendency of this action. The State of Hawaii also agreed to expunge from its records the names of class members who had previously failed the examination.

The stipulation reserved plaintiffs' right to apply to the Court for an order requiring payment of attorneys fees by the defendants other than the Dental Board members, i.e., Governor George R. Ariyoshi, the then Director of the Department of Regulatory Agencies, Wayne Minami, and the Executive Secretary of the Board, Herbert Chun, referred to here collectively as the state defendants.

Entitlement To Fees

Under Title 42, Section 1988, the court may in its discretion allow the prevailing party in a civil rights action a reasonable attorney's fee as part of the costs.[1] A plaintiff may be a prevailing party even if he obtained relief by settlement rather than adjudication. *Maher* v. *Gagne*, ___ U.S. ___, 48 USLW 4891 (June 25, 1980).

The state defendants contend first that plaintiffs did not prevail against them. They argue that it has not been shown that their acts denied plaintiffs their constitutional rights, and that they made no monetary or other significant contribution to the settlement.

Plaintiffs respond that they have achieved significant results in this litigation: reform of the State's dental testing and licensing procedures to provide for anonymity and consistency and for an appeal procedure, expungement of records of the class members who had failed the examination, and payment of money damages by the defendants who had been members of the Dental Board.

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[1] Section 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Initially it must be kept in mind that all of the defendants were sued in both their individual and their official capacity. Under the terms of their malpractice insurance policies as they stood at the relevant time, the Dental Board defendants were entitled to have their carriers defend them. The carriers elected to settle the individual damage claims against the Dental Board defendants, receiving in return a release of all claims against their insureds. Plaintiffs settled with the state defendants, represented by the attorney general, by entering into the stipulation making permanent the changes in the testing and licensing procedures and providing for expungement of prior examination results, but reserving plaintiffs' rights to recover attorneys' fees and costs.

The settlement leaves open plaintiffs' claims for attorneys' fees against all defendant in their official capacity and against the state defendants in their individual capacity as well. There is no basis for assessing fees against the state defendants in their individual capacity. *Wisconsin Socialist Workers 1976 Campaign Committee* v. *McCann*, 460 F. Supp. 1054 (E.D. Wis. 1978); *Arkansas Community Organization for Reform Now* v. *Arkansas State Board of Optometry*, 468 F. Supp. 1254 (E.D. Ark. 1979). The Court is aware of no facts indicating that any of the state defendants engaged in the acts or conduct which denied plaintiffs their constitutional rights. Their activities appear to have been confined to the lawful performance of the duties of their office.

The liability of defendants in their official capacity presents a different question however. In that capacity they represent the state of Hawaii and any award against them would be the state's liability. *Hutto* v. *Finney*, 437 U.S. 678, 700 (1978).

The argument of the state defendants based on the absence of a significant contribution by them to the settlement is irrelevant. A major aspect of the settlement was the reform of the testing and licensing procedures and the expungement of the records. The testing and licensing procedures, and the maintenance of records, are required by and conducted pur-

suant to the laws of the state. Although the Dental Board may have wide discretion in this respect, any rules or regulations it adopts under Sec. 91-1(4) H.R.S. are subject to approval by the governor under Sec. 91-3 and then become the law of the state. In adopting the agreed reforms, the defendants were therefore acting in their official capacity on behalf of the state. The state is the real party in interest and attorneys' fees may be properly assessed against it. *Hutto* v. *Finney*, above; *Dennis* v. *Chang*, 611 F.2d 1302, 1304 (9th Cir. 1980).

Defendants further contend that under the principle of *Newman* v. *Piggie Park Enterprises Inc.*, 390 U.S. 400 (1968), no fee award should be made where plaintiffs are unable to show injury. They argue that plaintiffs have failed to show that any discrimination actually occurred, pointing out that the relative rates of success of Asian-American and Caucasians, and old and new or non-residents, did not change materially under the reformed procedure. They further argue that plaintiffs' recovery of damages and the alleged existence of a contingent fee agreement obviate the need for a fee award.

Zarcone v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), on which defendants rely, indicates that a variety of factors must be taken into account by the district court in exercising its discretion whether to award fees. The principal factor is whether a person in plaintiff's position would have been deterred from seeking to enforce his civil rights without an assurance that his attorneys' fees would be paid if he were successful. Here, the attorneys appear to have been willing to proceed with the litigation without being paid more than a relatively small amount at the outset of the action, apparently upon an understanding that they would be compensated in some manner if plaintiffs prevailed. Notwithstanding these ambiguous circumstances, however, the Court, as a matter of policy, should not apply Section 1988 in a niggardly fashion which would tend to discourage the bar from taking on worthy cases seeking to vindicate important civil rights. *Dennis* v. *Chang*, above, 611 F.2d at 1306.

In addition, the *Zarcone* opinion, recently followed by this circuit in *Buxton* v. *Patel*, 595 F.2d 1182 (9th Cir. 1979), points out that other factors must be considered as well:

> This is not to say, of course, that in an appropriate case the nature and extent of the rights and interests at stake may not be considered by the trial judge in determining whether to shift attorneys' fees. For instance, when the claim involves civil rights of broad significance, prosecuted on behalf of a large class, and the prospective monetary award, if the suit is successful, would be modest in relation to the time, effort and skill required of counsel, the district court must weigh these factors in determining whether to award fees. In such a case the prospect of an award supplementing the fees that the successful plaintiff might be able to pay would be essential to attract competent counsel. Other factors entitled to consideration are the size of the benefits conferred by the suit on the public or on others, the amount of any fund created by the litigation (and its adequacy to cover the plaintiffs' costs and compensate him for actual damages), the presence or absence of any bad faith or obdurate conduct on the part of either party, and any unjust hardship that a grant or denial of fee-shifting might impose.

581 F.2d at 1044.

In this case, significant benefits were conferred on the plaintiff class and the public through the reforms achieved by counsel's efforts. Moreover, the amount of the fund created is not so great that fee-shifting should be ruled out. Finally, the amount of services required to be rendered by plaintiffs' counsel would have been less had it not been for the stubborn resistance offered by counsel for these defendants.

Plaintiffs have not come forward with evidence that discrimination actually occurred, and the recent examination results tend to show that it did not. But the Court's power to award fees is not conditioned on a judicial determination that the plaintiff has suffered constitutional injury. *Maher* v. *Gagne*, above. What plaintiffs have accomplished is to eliminate procedures without safeguards against discrimination, rather than discrimination as such. The size of the benefit is

therefore less than had this been a case of demonstrable discrimination. Nevertheless, taking all of the factors into consideration, the Court concludes that attorneys' fees should be awarded against the defendants in their offical capacity.

Amount Of Fees

Plaintiffs' counsel have submitted the following requests for fees and costs (including tax):

Shirley & Jordan:	fees	$254,564.00
	costs	31,437.58
Kemper & Watts:	fees	6,458.40
Nixon, Hargrave, Devans & Doyle	fees	13,098.00
	costs	1,928.31

In evaluating these requests, and determining what constitutes reasonable attorneys fees, the Court must follow the guidelines laid down in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), adopted by this circuit in *Kerr* v. *Screen Extras Guild*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), *sub nom. Perkins* v. *Screen Extras Guild, Inc.*

(1) The Time And Labor Required.

(a) Shirley & Jordan

From the inception of this litigation through October 10, 1980, four attorneys of Shirley & Jones claim to have expended 2917 hours. The petition divides the time into ten phases, as follows:

	Shirley	Smith	Simson	Levin	Total
3/27/75-12/16/76	122				122
12/17/76-12/31/77	243	31			274
1/1/78-4/24/78	85	25			110
4/25/78-9/5/78	100	16			116

9/6/78-2/23/79	210	14	73		297
2/24/79-5/11/79	375	72	182	61	690 (11 weeks)
5/12/79-7/13/79	170	26	60	48	304 (9 weeks)
7/14/79-3/31/80	180	113	97	151	-541
4/1/80-date	27	47	100	20	194
					2648
8/4/80-present (Fee petition)	92	88	86	3	269
Totals	1604	432	608	282	2917

The tabulation shows, among other things, that during an eleven-week period from February to May, 1979, four attorneys spent 690 hours, or over sixty hours per week, and during a nine-week period from May until July, 1979, they spent 304 hours.

Counsel argue that substantial amounts of time had to be expanded by them for a number of reasons: the need to design novel examination procedures largely without precedent, the number of lawyers and the size of their firms opposing plaintiffs, and the obdurate resistance of the attorney general's office.

On the other side of the argument are these factors: double-blind dental examinations are not novel and to a considerable extent plaintiffs were able to adopt the California procedures; aside from some initial discovery disputes, the only court proceeding for which the attorneys had to prepare was the class certificate motion; and at the time of settlement, discovery was far from complete and the case far from ready for trial.

These considerations lead the Court to conclude that the total of nearly 3000 hours for the services performed over

approximately 5 years is excessive. Illustrative of what seems to the Court a liberal accumulation of hours is the charging of 269 hours for only partial preparation of the petition for fees. In the Court's opinion a client ought not to be charged for the time required to prepare a bill; accordingly, except in unusual circumstances, this time does not belong into a petition such as this at all. But even if it did, the number of hours charged (which counsel say do not even cover all the work done) appears excessive. *See Miller* v. *Mackey Intern. Inc.*, 70 F.R.D. 533, 537 (S.D. Fla. 1976).

Proceeding from these general observations, the separate claims made on behalf of the individual lawyers should be examined. The bulk of the fees sought is for services rendered by Evan R. Shirley, as follows:

899 hours at	$100 =	89,900
340 hours at	$ 85 =	28,900
241 hours at	$ 75 =	18,075
96 hours at	$ 65 =	6,240
27 hours at	$ 50 =	1,350
1604		144,465[2]

Several observations are in order concerning this claim. First, it is based not on contemporary time records reflecting current entries which record the services performed each day and the time spent on them. Instead, it is a reconstruction from Mr. Shirley's office diary and other files and papers of the office. Reconstructed time totals, based largely on estimates from other records supplemented by memory, are insufficient to support claims of this magnitude.

Second, even accepting the contention that the nature and complexity of the case demanded large amounts of time during 1979 and 1980, the Court has reservations about allowing such a volume of work to be charged at top rates. Although the level

[2] The Court approves of petitioners' method of computing their charges by applying the different rates said to have been in effect at the different times when services were rendered.

of rates charged at various times during the past five years may be reasonable, neither rates nor hours can be considered in the abstract. A rate of $100 per hour may be appropriate for an attorney while performing work requiring the kind of skill and experience which can command that rate. It has been shown how much of the work done by Mr. Shirley was that kind of work; it is reasonable to conclude, however, that when such a large number of hours is expended on non-trial activities during a relatively short period, much of the work done is routine.[3] Counsel point out that in their small firm, they did not have a complement of junior associates to do the routine work. Nevertheless, this does not justify charging premium rates for a large number of hours covering services requiring lesser skills.

Finally, the Court questions the necessity for having three lawyers in addition to Mr. Shirley devote substantial amounts of time to the case during 1979 and 1980. Their presence in the case further diminishes the need for as many hours as Mr. Shirley claims to have expended.

Considering all of the foregoing factors, the Court concludes that the fees claimed by Mr. Shirley should be reduced by sixty percent.

For Elbridge W. Smith, fees of $39,187 for 432 hours are claimed, an average rate of about $90 per hour. Mr. Smith became a member of the bar in 1977; his services were rendered during his first three years of practice. A rate of $90, if that was intended, is excessive.[4] Under the circumstances,

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[3] Whenever possible, hours should also be segregated between court and office time and different rates assessed. The records in this case do not appear to make segregation feasible. In any event, no significant amount of time was spent in court, rendering application of what would normally be a somewhat nigher rate inappropriate.

[4] Perhaps through inadvertence, counsel are claiming $35,300 for 353 hours charged at a rate of $65 per hour. The correct amount for that time at $65 would be $22,945.

including the large number of hours charged, an average rate of $50 would be reasonable, for a fee allowance of $21,600.

For Marguerite B. Simson, fees of $33,000 for over 600 hours are sought, for an average rate of $55 per hour. Ms. Simson has been a member of the bar since 1978. The number of hours charged as well as the rate seem excessive; a fee of $15,000 is reasonable.

For Stanley B. Levin, fees of $28,200 are claimed for 282 hours. Mr. Levin, who has been a member of the bar since 1972, was brought into the case to provide expert advice on civil rights class actions. His role obviously expanded. His presence in the case must be taken into account in evaluating Mr. Shirley's time. In addition, in view of the large overall time expenditure, his claim will be reduced by 25 percent.

Ms. Simson and Messrs. Smith and Levin kept current time records and their claims for that reason are entitled to greater weight. Nevertheless, the Court would feel more confident in making a fee award if records were kept in a manner permitting verification of the total hours charged each day for all matters.

(b) Other Counsel

Edward R. Kemper seeks fees of $6,458.40. Mr. Kemper represented Arne Koch, one of the individual plaintiffs, in the action. The Court cannot say that his participation exceeded the minimum necessary to look after his client's interests.

The firm of Nixon, Hargrave, Devans & Doyle seeks fees of $13,098 for services rendered by their offices in Rochester, N.Y., and Washington, D.C. The firm was retained to assist in efforts to obtain records of the American Dental Associates. The amount sought appears excessive considering the limited purpose of their retainer. Their time records also indicate that some time was devoted to legislative contacts and public relations on behalf of plaintiffs. The fee allowed will be reduced by 25 percent.

(2) Other Relevant Factors

The *Johnson* decision calls on the court to consider several factors other than hours. Some of these factors have been referred to in the foregoing discussion. The Court in reaching its decision has taken the following additional factors into account.

The novelty and difficulty of the issues presented. Except for the need for some fairly sophisticated computer analysis, the issues presented do not appear to the Court to have been novel or unusually difficult.

Preclusion of other employment. While the large amount of time expended might have precluded other employment, there is no evidence that other employment was in fact available to counsel at the time and foregone.

The customary fee. There is no evidence of the level of fees customarily collected by these attorneys. The Court is guided, however, by its general familiarity with the level of attorneys' fees.

Whether the fee is fixed or contingent. It appears that under the agreement between Mr. Shirley and Dr. Pekarsky, counsel are entitled to charge him for their services at rates or in amounts not fixed by the agreement. Dr. Pekarsky's share in the recovery would, however, not enable him to make more than a token payment on account of fees. The settlement stipulation by its terms bars a claim for fees against the fund created by the settlement but it does not bar plaintiffs' counsel from charging the individual class members for their services. Counsel have made no arrangements with them, however, for compensation and, in connection with obtaining the class members' consent to the settlement, have advised them that they would not be billed for fees.

Time limitations on counsel. The scheduling of the dental examination required counsel to work under some pressure in developing the revised procedures incorporated in the interim stipulations in time for the examination, but no significant inconvenience seems to have resulted.

The amount involved and the results obtained. As the Court has previously discussed, counsel are entitled to credit for having obtained favorable results, including a damage settlement which was generous given the facts of the case. The lack of evidence of actual discrimination must, however, be taken into account in appraising the benefit conferred. The Court also takes into account that the efforts of plaintiffs' counsel, and their ability to persuade their clients to settle the case were beneficial to the state and saved it considerable expense.

The experience, reputation and ability of the attorneys. To the extent the Court has had an opportunity to observe and appraise the work of the attorneys, it has found that work to have been completely done. All of the attorneys are, to varying degrees, experienced civil rights lawyers. They are, however, relatively junior members of the bar whose standing and reputation does not as yet command premium rates, certainly not for large amounts of time.

The undesirability of the case. The Court does not consider this case, notwithstanding defendants' vigorous opposition and its racial implications, to be of a character entitling counsel to a premium for taking an unpopular case.

Awards in similar cases. The Court derives little guidance from the awards made in other cases because of the unique factors presented by this and the other cases.

Finally the Court is mindful, not only of the policy favoring attorneys fees awards in civil rights cases to encourage enforcement of the civil rights laws, but of the need to take public sensibilities into account. Excessive awards can be counterproductive by bringing this kind of litigation, and attorneys conducting it, into disrepute. Civil rights litigation should, of course, not be singled out. The same sensitivity must be brought to bear on all civil litigation in which the courts award fees. *See National Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331, 1338-39 (1st Cir. 1973). Whether this has consistently been done or not, the Court considers it a material factor in awarding fees here.

Disbursements

A substantial portion of the services performed by Ms. Margo Billam Walker were those of a secretary or clerk rather than a paralegal (such as operating a copying machine, extracting and coding data from files, and maintaining contact with class members). The cost of secretarial services, as well as the cost of office space for this purpose, are ordinary overhead expenses. The Court recognizes, however, that the clerical work required by this case may, to an extent, have been beyond the capacity of the regular staff of a small law firm. In the interest of an efficient allocation of resources, the Court believes that the reasonable cost of extra clerical assistance needed should be reimbursed to avoid having the work done by attorneys. *Chapman* v. *Pacific Telephone & Telegraph Co.*, 456 F. Supp. 77, 82 (N.D. Cal. 1978). The Court will therefore allow $7,500.

The Court will allow on account of the other out of pocket costs claimed the sum of $11,385.87.

Conclusion

For the reasons state above, the Court awards fees and costs against defendants in their official capacity only, as follows:

To Shirley & Jordan

fees	—	$ 94,386.00
costs	—	18,885.87
total	—	$113,271.87 [5]

To Stanley B. Levin — $21,150.00

To Edward R. Kemper — $ 6,458.40

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[5] The record reflects that Shirley & Jordan have heretofore been paid $31,301.34 by Dr. Pekarsky on account of fees and services. Inasmuch as only a partial award of fees is made here, there is no reason to charge this amount against the award.

To Nixon, Hargrave, Devans & Doyle

fees	—	$ 9,824.00
costs	—	1,928.31
		$11,852.31

No further or additional fee requests will be entertained in this action.

IT IS SO ORDERED.

DATED: December 16, 1980

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CIVIL NO. 76-0455

ROBERT L. PEKARSKY and ARNIE J. KOCH, Individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

GEORGE R. ARIYOSHI, Individually, and in his capacity as Governor, State of Hawaii, *et al.*,

Defendants.

ORDER

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JAN 15 1981
at 9 o'clock and 20 min. am
WALTER A. Y. H. CHINN, CLERK

The motion for reconsideration of the order on application for attorneys' fees is denied.

IT IS SO ORDERED.

DATED: January 12, 1981

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge